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SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1260

NOEL CHANDLER and ROBERT GRANGER,
Appellants,

against

THE STATE OF FLORIDA,
Appellee.

On Appeal from the Supreme Court of Florida

Brief and Appendix of the Attorneys General of Alabama, Alaska, Arizona, Iowa, Kentucky, Louisiana, Maryland, Montana, Nevada, New Mexico, New York, Ohio, Rhode Island, Tennessee, Vermont, West Virginia, and Wisconsin as Amici Curiae In Support Of Appellee

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INTEREST OF AMICI CURIAE

The state attorneys general have a duty to protect the constitutional rights both of the public and of criminal defendants. The question whether electronic media coverage of judicial proceedings may continue implicates the public's constitutional right to attend

trials and a defendant's constitutional right to due process of law. Evaluation of the results of experiments with electronic media coverage has led the undersigned attorneys general to conclude that the public can exercise its right to attend court by means of watching televised reports of the proceedings without infringing a defendant's right to a fair trial. Therefore the Court is urged to permit state experimentation with electronic media coverage of judicial proceedings to continue.

SUMMARY OF ARGUMENT

The limited holding of *Estes v. Texas* permits state experimentation with electronic media coverage of trials. Such experiments have yielded data, unavailable when *Estes* was decided, which demonstrate that television coverage of a judicial proceeding does not in itself deny a defendant a fair trial. Continuation of thoughtfully designed programs through which the states can test rules governing media coverage will result in standards which afford maximum protection of defendants' due process rights and of the public's right of access to trials.

The problems which the *Estes* court speculated might be created by electronic media coverage of trials have not developed. Most participants in televised trials do not report the psychological reactions to the televising process anticipated in *Estes*. This is due partly to improvements in technology which allow unobtrusive court coverage.

Jurors are no more likely to be prejudiced by pretrial publicity or by exposure to community comment and news reports concerning the trial in a case which is televised than in one which is not. The same measures which protect defendants in non-televised trials adequately protect defendants whose trials are

televised. A change of venue is available if pretrial publicity is inflammatory and the usual sanctions can be imposed if jurors disregard the court's instruction not to watch televised reports of the trial. The rules governing media coverage of trials can prohibit photographing the jury, ensuring that jurors will not be unusually visible to the public.

Jurors in televised trials have not reported substantial distraction due to awareness that the media was covering the trial. Most were too intent on the proceedings to think about news coverage and even those reporting some awareness of the coverage stated that it did not interfere with their deliberations.

Provisions to protect witnesses who have a legitimate reason for not testifying in front of cameras, *e.g.*, crime victims and confidential informants, can be included in the rules governing media coverage. Most witnesses questioned indicated they were no more nervous testifying in front of a camera than they would have been testifying at a well-attended trial. There is scientific and experiential evidence which shows the camera may have a positive effect on some witnesses.

Judges need not be burdened with extra administrative duties in trials covered by the electronic media. Many potential problems can be eliminated by promulgating detailed statewide rules and most unique media related questions which arise in an individual trial can be handled by a media coordinator or by other court personnel.

Neither attorneys nor judges in televised trials have displayed any special tendency to play to the audience. Those who are normally flamboyant need no greater audience than the jury and courtroom spectators to inspire them and those who are not flamboyant are not transformed by the presence of cameras.

Media coverage can be handled in a way which does not harass the defendant. Camera operators and still photographers who are required to stay behind the rail cannot intrude unduly on the defendant. Coverage of conferences with counsel and of recesses can be prohibited.

Televised trials are not inherently unfair to defendants and a total ban on television coverage is not necessary to protect defendants' constitutional rights. Specific errors alleged to arise due to electronic media coverage can still be raised as the basis of a denial of due process claim. State experimentation with electronic media coverage of trials should be allowed to continue.

ARGUMENT

I. *Estes v. Texas* Did Not Preclude State Courts From Experimenting With Televised Trials.

During the last six years, the highest courts of many states have authorized photographing, televising, and radio broadcast of trials on an experimental basis. Successful experiments have led to the adoption of permanent rules permitting electronic media coverage of court proceedings in some states. This court's decision in *Estes v. Texas,* 381 U.S. 532 (1965), permitted the states to experiment with televised trials. Although Estes's conviction was reversed because the nature of the media coverage in his case denied him a fair trial, the court did not hold that all television coverage of trials would deny a defendant due process.

Four members of the *Estes* court would have held that televising a trial is in itself a denial of due process, 381 U.S. at 542, 544, 552 (Warren, C.J.,

concurring), but Justice Harlan, who voted with the plurality to reverse, did not go so far in his concurring opinion. Justice Harlan stated that the court's decision was limited to particularly notorious criminal trials and had no application to routine criminal proceedings. 381 US. at 587, 591. He declined to prevent the states from experimenting with televised trials. *Id.* at 587, 590. In his dissent, Justice Brennan underscored the point that *Estes* does not constitute a blanket prohibition against electronic media coverage of state criminal trials. *Id.* at 617.

The states did not begin experimenting with televised trials immediately after *Estes* was decided, but by the mid 1970's conditions favored experimentation. Television had become more widespread and more people relied on television for news than had in the early 1960's. Also, television technology had improved, making unobtrusive coverage feasible.

The experiments which have been conducted, and which will be discussed in this brief, show that television coverage does not in itself deny defendants a fair trial. Mistakes and abuses by the media could be prejudicial in some cases, but nothing indicates that those errors would be any more common than other trial errors which are raised on appeal. The possibility of error in isolated cases no more justifies banning television cameras from all trials than the possibility of prejudicial pretrial publicity justifies preventing newspapers from covering criminal cases.

This Court recently recognized that the public has a constitutional right to attend criminal trials. *Richmond Newpapers, Inc. v. Virginia,* — U.S. —, 27 Crim. L. Rep. 3261, 3268 (July 2, 1980). In the *Richmond Newspapers* case the Court repeatedly observed that most people now acquire information about court proceedings through the print and electronic media, not through attending court themselves. The media

operate, therefore, as surrogates for the public. *Id.* at 3266, 3267 n. 12, 3269 n. 2 (Brennan, J., concurring). Priority of entry and special seating are often provided for media representatives so they may report to the general public, thereby enhancing the community's comprehension of the law and of how the courts function. *Id.* at 3266, 3268 n. 18.

The media should not be prohibited from using television cameras as one means of assisting the public to exercise its constitutional right to attend criminal trials unless there is a demonstrable overriding interest, *see id.* at 3268, and there is no such interest in most cases. When *Estes* was decided there was virtually no information available on how televising a trial affected the participants, so the court was forced to speculate. But now that information has been obtained through televising numerous trials. Reports from the states show that televising a trial does not have a negative effect on trial participants and therefore does not prejudice the defendant. Since the mere presence of television does not deny a defendant a fair trial, he must make a specific claim of prejudice before his interest can override the public's right to attend his trial by means of the television coverage.

II. State Experiments With Televised Trials Have Been Carefully Designed And Cautiously Conducted. The Results Demonstrate That Experimentation Should Continue.

The appellants have not alleged that any particular circumstances connected with the television coverage of their trial resulted in a denial of due process. They argue that it is impossible for any

televised trial to be a fair one. Because the experience of the various states does not support that conclusion, it would be inappropriate flatly to prohibit all television coverage now when there is a trend toward increased experimentation.

This Court has encouraged state experimentation in the past, *cf. Wolf v. People of the State of Colorado,* 338 U.S. 25 (1949), with *Mapp v. Ohio,* 367 U.S. 643 (1961); *Betts v. Brady,* 316 U.S. 455 (1942), with *Gideon v. Wainwright,* 372 U.S. 335 (1963). When *Estes* was decided, the highest court of almost all of the states had forbidden televising trials. 381 U.S. at 580-581. Still, Justice Harlan declined to say that it would be a denial of due process to televise any criminal trial because such a blanket prohibition "would doubtless impinge upon one of the valued attributes of our federalism by preventing the States from pursuing a novel course of procedural experimentation." *Id.* at 587.

If the Court does not find the currently available data sufficient to support a holding that televised trials do not in themselves deny defendants due process, it should focus only on Florida's rules governing electronic media coverage of trials and determine whether operation of those particular rules denied the appellants a fair trial. The rules vary among states, and all rules can be amended, so a correctable defect in Florida's rules does not require forbidding televised trials everywhere./[1]

/[1]Florida, Montana, New Hampshire, and Wisconsin have permanently adopted rules which authorize televising criminal trials without the defendant's consent. The rules governing televised trials adopted by the supreme courts of Florida, Montana, and Wisconsin are set out in the appendix to this brief.

Iowa, Nevada, New Jersey, New Mexico, Ohio, and West Virginia have conducted or are conducting experiments during which trials may be televised without a defendant's consent.

(footnote 1 continued on next page.)

Experimentation with televised trials has proceeded in a cautious, responsible manner. In Florida, when the supreme court received a petition seeking a reexamination of the judicial canon forbidding television and still photography in the courtroom, *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So. 2d 764, 766 (Fla. 1979), its first steps were to obtain materials favoring and opposing the change and to watch a videotape of court proceedings made in another state. *Id.* After that preliminary study the court ordered an experiment in a single judicial circuit which was to consist of televising two trials, one civil and one criminal, according to the court's guidelines and with the participants' consent. *Id.* But although the experiment was extended to three other circuits, no trials were televised because consent was not given. *Id.* Only then, because it viewed the experiment as essential to a decision on the petition before it, did the court order a one-year experiment in televising trials without the participants' consent. *Id.*

At the end of the experimental period the court received and reviewed an "imposing" amount of material, including briefs, reports, resolutions, comments, and exhibits. *Id.* at 767. All parties, media representatives, judges, and members of the public who

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(footnote 1 continued.)

All other states which permit electronic media coverage of the trial courts require at least the consent of the defendant and some require the consent of all parties or all participants. A trial televised with the defendant's consent raises different fair trial questions than one televised without the defendant's consent.

/[2]See *e.g.*, Sholts, Report to the Supreme Court of Florida re: Conduct of Audio-Visual Trial Coverage (hereinafter cited as Sholts Report); Baker, Report to the Supreme Court of Florida re: Conduct of Audio Visual Trial Coverage (hereinafter cited as Baker Report). Copies of the Sholts and Baker Reports have been lodged with the clerk of this court.

(footnote 2 continued on next page.)

participated in the televised trials were asked to report their experiences to the court. *Id.* at 767./[2] A unit of the office of state courts administrator conducted a survey of non-judicial participants in the trials, *id.* at 768, and the Conference of Circuit Judges conducted a survey of its membership. *Id.* at 767. An independent study was done by a group of Florida academicians. *See,* Strawn, *et al.,* Report, In re Petition of Post-Newsweek Stations, Florida Inc., for Change in Code of Judicial Conduct (hereinafter cited as Strawn Report)*; Pryor, *et al.,* "The Florida Experiment: An Analysis of On-the-Scene Responses to Cameras in the Courtroom," 45 So. Speech Comm. J. 12 (1979); Buchanan, *et al.,* "The Florida Experiment," 15 Trial 34 (April 1979). The court received briefs on the petition from twelve intervenors and amici curiae. *Petition of Post-Newsweek,* above, at 765.

During the term of the experiment there was variation in the administration of the rules among Florida's twenty judicial circuits. Whisenand, "Florida's Experience with Cameras in the Courtroom," 64 ABAJ 1860, 1862 (1978). Thus, the Supreme Court had the benefit of experiments within the experiment to guide it in deciding on the petition.

The court made adjustments based on the pilot program. The guidelines under which the experiment was conducted did not include a standard for the judge to apply in determining whether to prohibit photographing certain witnesses. *Petition of Post-Newsweek,* above, at 783. The need for such a standard became clear during the experimental period, *id.* at 778, and the court promulgated one in its decision amending the canon. *Id.* at 779.

(footnote 2 continued.)

Several reports cited in this brief are not generally available and, therefore, copies have been lodged with the clerk. The first citation in this brief to each such report will be followed by an asterisk.

Florida took a cautious approach to amendment of the canon which barred cameras from the courts. The supreme court made changes in the smallest possible steps and an exhaustive study was made of all that had occurred during the experiment. The Florida experiment is an example of optimal use of the state as a laboratory.

Other states conducting pilot programs have also controlled them carefully and have made critical studies of the results. In Wisconsin the supreme court first received a petition for change of the rule against televising trials in 1970. Report of the Supreme Court Committee to Monitor and Evaluate the Use of Audio and Visual Equipment in the Courtroom 6 (April 1, 1979) (hereinafter cited as Wisconsin Report).* The court appointed a committee which reported to it on the feasibility of the change, *id.* at Appendix F, and the court ultimately voted to retain the rule. *Id.* at 6. Seven years later the question arose again and the supreme court voted to suspend the rule for one year to permit televising trials on an experimental basis. *Id.* at 1.

A committee comprised of judges, attorneys, professors, and lay persons was appointed to monitor and evaluate the experiment. *Id.* The committee sought reports on the project from various sources. It employed law and graduate students as trial observers, *id.* at 2, and wrote to all of Wisconsin's trial court judges requesting their reactions to any televised proceedings over which they had presided. *Id.* at 53. About one-third of the judges responded. *Id.* Other participants in the trials were interviewed. *Id.* at 6-48 and Appendix I. The results of the interviews and a discussion of controlling law were submitted to the supreme court with the committee's unanimous recommendation that still photography, radio broadcasting, and television cameras be permitted in Wisconsin's courts. *Id.* at 56-57.

The committee also made recommendations for changes in the rules under which the experimental televising was conducted. *Id.* at 61-74. Like the Florida court, the committee saw a need to clarify the standards for applying the rule which allowed the judge to prohibit photographing individual participants. During the experimental period various groups had contacted the court about the rule: women's groups asked that photographing of rape victims be prohibited; a coalition of the elderly asked that elderly crime victims be entitled to veto coverage of their testimony; and the need for confidentiality of undercover agents and relocated witnesses was pointed out. Hoyt, "Prohibiting Courtroom Photography: It's Up To the Judge in Florida and Wisconsin," 63 Judicature 291, 294 (1980). The committee considered the requests which were made by letter or presented at a public hearing, *id.*, and reached a compromise. The suggested rule, which the court adopted, accords a presumption of validity to the requests not to be photographed of people in certain categories, including crime victims, juveniles and police informants. Wisconsin Report, above, at 70; Rules Governing Electronic Media and Still Photography Coverage of Judicial Proceedings, 11 (b), In re Code of Judicial Ethics, 90 Wis. 2d xix, xxii (1979) (hereinafter cited as Wisconsin Rules)./[3] The process by which Wisconsin's rule on excusing witnesses from being photographed was adjusted shows the value of experimentation and demonstrates that experiments are being undertaken in good faith with the goal of protecting all the interest involved. The process was open to suggestions and criticisms from everyone who was concerned and the committee and court acted on the suggestions they received.

/[3]The Wisconsin Rules are included in the appendix to this brief. The appendix will be cited in the brief as AB. *See* AB 16.

None of the states has rushed to allow televised trials in disregard of a defendant's due process rights. In New York, cameras were first permitted in the appellate court for only one day. When the response was uniformly favorable, the Chief Judge appointed a media advisory committee to study the issue and make recommendations on broadcasting or telecasting from courtrooms. Interim Report to the Chief Judge of the New York State Court of Appeals by the Media Advisory Committee 2 (May 30, 1980) (hereinafter cited as New York Report).* After soliciting the views of all interested groups and individuals, *id.* at 3, and studying the voluminous response, *id.* at 4, the committee recommended permitting broadcast of appellate proceedings on a permanent basis, since an experiment had already been conducted, and recommended authorizing experimental coverage in trial courts. *Id.* at 5.

In Washington, the first experimental step, taken in 1974, was to film and tape a single trial. Washington Bench-Bar-Press Committee, Report Of The Subcommittee on Canon 35 (April 5, 1975) 35 (hereinafter cited as Washington B-B-P Report).* The film and tape were made to permit observation of the actual operation of equipment, but they were never telecast. *Id.* at 33. Witnesses and jurors were interviewed and reports from other participants were solicited. *Id.* at 4, 5. The experiment was successful and the committee proposed that the court permit televising trials on a permanent basis. *Id.* at 32. Two years later, in 1976, the supreme court authorized televising during court sessions. Washington State Superior Court Judges' Association Committee on Courts and Community, "Cameras in the Courtroom — A Two-Year Review in the State of Washington" 1 (Septemeber 11, 1978) (hereinafter cited as Washington Report).* A committee of the Superior Court Judges'

Association did a study in 1978 and concluded that the data available supported continuing to permit televised trials. *Id.* at 7. The committee also stated its intention to continue monitoring the media acitivity and to make reports to the judges. In Washington the experiment is ongoing and early success has not diminished the care with which the courts approach televising trials.

Twenty-five years ago when the Colorado Supreme Court questioned whether cameras should continue to be banned from court, its referee heard six days of testimony, complete with demonstrations of equipment, and then made a report to the court which resulted in the court's permitting televised trials. *In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics,* 296 P.2d 465 (1956). Courts have become even more careful in making that decision. Although each state which considers the issue profits from the experience of those which have already done so, none has adopted a rule based strictly on the experience of others without looking into the matter further. In New York, for example, the Media Advisory Committee recommended that consent of the parties to televise not be required during the experimental period since the experience of other states was that consent was difficult to obtain. New York Report, above, at 12. But the committee believed that it was essential that the state courts conduct their own experiment to determine the impact of television upon court proceedings in New York. *Id.* at 9. The process by which the states learn from each other, yet conduct independent experiments and introduce unique innovations, should be allowed to continue.

Whether televising trials is constitutional does not depend upon whether it is popular. But there is evidence that many who are initially negative about

permitting cameras into court change their minds after participating in a televised trial. One Florida study found that judges who had presided over one or more televised trials were more favorably disposed to the idea than those who had not. Strawn Report, above, at 51. The same was true for attorneys who had participated in televised trials as compared to those who had not. *Id.* at 60. An Illinois judge who travelled to Florida with a delegation from the Illinois State Bar Association to observe televised trials commented that members of the delegation were skeptical whether a fair televised trial was possible, but what they saw in Florida changed their opinions. Aspen, "Cameras in the Courtroom: The Florida Experiment," 67 Ill. Bar J. 82, 85 (1978). Televised trials should not be banned at this early juncture when relatively few people have actually participated in one. Negative opinion which is based only on speculation should not be permitted to outweigh the positive experience reported by many states.

III. Improvements In Technology Which Make The Electronic Media Unobtrusive In The Courtroom Have Minimized The Possibility Of Trial Participants Reacting Negatively To Television Coverage.

The *Estes* court identified problems with televised trials which were unrelated to the obtrusiveness of the equipment used, but the relatively undeveloped state of the art in 1962 played an important part in the Court's decision. Former Chief Justice Warren's concurring opinion, in which two justices joined, emphasized the

disorderly scene created by the media representatives and equipment at a pretrial hearing. 381 U.S. at 552-554. Although the media presence at *Estes's* trial was less obstrusive, the pretrial conditions influenced the court's decision. *Id.* at 567. The Court also expressed the fear that the sponsorship demands of commercial television would lead to only the most sensational trials being televised. *Id.* at 545.

The Court observed that when advances in television technology occurred a different due process question would be presented. *Id.* at 540. In his concurring opinion, Justice Harlan noted the day might come when television was such a widely accepted part of everyday life that there would be no reasonable possibility that the judicial process would be disparaged by televising trials. *Id.* at 595. Then the due process issue presented by permitting cameras in courtrooms would have to be reexamined. *Id.* at 595-596. The question is now ripe for reexamination because great technological advances have been made and television is a much more common part of most people's daily lives than it was in 1962, when Estes was tried.

One of the justices of the Florida Supreme Court has explained that post-*Estes* advancement in electronic and photographic technology was a primary factor in that court's decision to permit cameras in court on an experimental basis. Boyd, "Cameras in Court: *Estes v. Texas* and Florida's One Year Pilot Program," 32 U. Miami L. Rev. 815, 820 (1978) (hereinafter cited as Boyd). The reports on televised trials which the Florida court reviewed at the end of the experiment showed that physical disturbance from the equipment had been minimized so that it was not even arguably a factor which would militate against continuing to permit televised trials. *Petition of Post-Newsweek Stations,* above, at 775. The presiding judge

at one trial televised during Florida's experiment confirmed that television equipment no longer creates a theatrical appearance in the courtroom. Sholts Report, above, at 14-15. The television camera was compact and unobtrusive, no Kleig lights were used, and the television cables were hidden. *Id.* at 15. After a televised trial in Wisconsin an observer commented that the cameras were very inconspicuous because the red "on the air" lights were disconnected and the operators minimized camera movement. Wisconsin Report, above, at 35.

There is general agreement among commentators that the day anticipated by the *Estes* court has arrived: television technology has advanced and television has become common-place. *See, e.g.,* Comment, "T.V. or Not T.V.: Televised and Photographic Coverage of Trials," 29 Mercer L. Rev. 1119, 1129 (1978); Note, "Televised Trials: Constitutional Constraints, Practical Implications, and State Experimentation," 9 Loyola U. of Chi. L.J. 910, 925 (1978). The appellants acknowledge that technological improvements have made camera operations less obtrusive. Appellants' Brief at 38.

Other developments in television have undercut the *Estes* court's concern that the economic demands of commercial television would dictate that only notorious trials be televised. The advent of public television and community access cable television provides alternatives where programming schedules are not determined by commercial considerations. At least one Florida criminal trial was broadcast gavel to gavel by the Public Broadcasting System. Sholts Report, above, at 5.

All types of stations have shown that their interest in covering court proceedings is not limited to sensational criminal trials. During a two year ex-

perimental period in Washington, television and still cameras were permitted in courtrooms. Criminal trials attracted the media, but so did sentencings, arraignments, legal arguments in a pornography case, an action seeking an injunction, zoning disputes, a traffic appeal, and civil trials raising property damage claims. Washington Report, above, at 2. During Wisconsin's experimental period an appellate argument in a banking law case was televised, as was a trial court case involving annexation. Wisconsin Report, above, at 44 and 45. According to Fred Graham, C.B.S. News Law Correspondent, opening courtrooms to television will lead to expanded coverage of a variety of court proceedings even on commercial stations. Using artists' courtroom sketches to illustrate a story seems archaic, but when film clips and photographs are available more stories will be deemed newsworthy. Graham & Fretz, "Cameras in the Courtroom: A Dialogue," 64 ABAJ 545, 547 (1978).

A Nevada commercial station successfully met the challenge of editing a videotaped trial for later broadcast. The television director edited thirty-five hours of videotape to produce a five hour broadcast. The show did not focus only on the more exciting parts of the trial, but presented the trial as an observer in court would have seen it with boring segments balanced against the dramatic moments. Goldman & Larson, "News Camera in the Courtroom during *State v. Solorzano:* End to the *Estes* Mandate?", 10 Southwestern U.L. Rev. 2001, 2038 (1978) (hereinafter cited as Solorzano). The advertisements were placed at natural breaks in the proceedings. *Id.* at 2039.

Improvements in technology and the existence of stations with non-commercial programming do not settle the question whether trials may fairly be televised. In *Estes,* Former Chief Justice Warren emphasized that the problem with televised trials was

the participants' awareness of being televised, not the noise and appearance of the cameras. 381 U.S. at 570. But there is a link between the obtrusiveness of equipment and the participants' awareness of the process. Anyone is less likely to be distracted by a silent film camera and stationary still photographers than by a camera which makes a whirring sound and still photographers who are running around the room in search of better angles. So in considering the psychological impact of the televising process on trial participants, one should be aware that any of the reactions anticipated in *Estes* would at least be diminished today because there is less to which to react.

IV. Jurors In Televised Trials Have Not Experienced The Problems Anticipated In *Estes*.

One of the main concerns of the *Estes* court was the impact which televising a trial might have upon the jury. The court saw a potential for problems in several different areas. Pretrial publicity in a notorious case might prejudice prospective jurors. 381 U.S. at 545. If the jury were not sequestered — at substantial cost to the community — jurors might watch televised portions of the trial in the evening and consequently place greater emphasis on the testimony which was deemed newsworthy. *Id.* Jurors might also feel pressured by the knowledge that others, having watched the trial on television and formed their own opinions on the defendant's guilt, might be critical if the jury did not reach the same conclusion. *Id.* The *Estes* court speculated that the fact that the trial was televised might subtly distract jurors even if television equipment were improved so its operation did not create an overt distraction. *Id.* Finally, if a second trial became necessary it might be difficult to draw a jury

because so many people would have seen parts of the first trial and formed an opinion as to the defendant's guilt. *Id.* at 546-547.

A. Prejudicial Effect Of Publicity On The Jury.

Many of the potential problems which concerned the Court are not unique to televised trials. *See* Whisenand, "Cameras and Courtrooms: Fair Trial — Free Press Standards," 52 Fla. B.J. 456, 458 (1978); Hanscom, "Cameras in the Courtroom: A Challenge for California," 53 Cal. State B.J. 226, 227 (1978). It may be the notorious cases which are most likely to receive television coverage, but those cases will also be heavily covered in newspapers and magazines. Television news coverage in advance of the trial would involve the same sort of background information provided by the print media and would not necessarily entail televising pretrial proceedings. If a film clip from a preliminary hearing or a motion hearing were broadcast, there is no reason to assume it would influence prospective jurors more strongly than a newspaper account of the same hearing. The question of prejudicial pretrial publicity can arise in any trial, whether it is to be televised or not. If voir dire of the jury demonstrates an actual problem, the remedy of changing venue is available.

Venue could also be changed for a second trial if the panel from which a jury was to be drawn had been biased by viewing the first trial. But such widespread prejudice is not a realistic concern. Usually not more than forty percent of the television audience watches even the most popular shows, Boyd, above, at 824, and those who do watch do not necessarily form an opinion which is different or more definite than that they would have formed by reading the paper. Further, second trials which result from reversals on appeal

will generally occur years after the original proceeding and the memories of prospective jurors will have faded. There would be some lapse of time even when a new trial results from a mistrial declaration or from the trial court's postconviction order.

B. The Influence Of Television Coverage On An Unsequestered Jury.

An unsequestered jury sitting in a televised trial is in no greater danger of being prejudiced by the comments of those in the community or by media reports than is a jury in an untelevised trial. The jury will be instructed not to discuss the case with anyone, not to read any newspaper stories about it, and not to watch television reports concerning the trial. The operating assumption is that juries follow the instructions they receive. There is no reason to believe jury members who avoid forbidden newspaper accounts and refuse to discuss the case with friends will feel an irresistible compulsion to watch televised accounts of the trial. This is a matter of personal integrity. When deciding whether to adopt a permanent rule permitting cameras in court, the Florida Supreme Court declined to assume that jurors were unable or unwilling to abide by their oaths and the court's directions, saying that to make the assumption would "impeach the foundation of our system of justice." *Petition of Post-Newsweek*, above, at 777.

If individual jurors violate any of the court's instructions and are found to have been prejudiced they can be replaced by alternates or a mistrial can be

declared. This would happen in televised trials no more often than in those which are not televised./[4]

C. Community Pressure On Jurors.

The *Estes* court feared that even jurors who were sequestered during trial might be influenced by community opinion. A juror who knew the community was hostile to a defendant might be afraid not to vote for conviction. 381 U.S. at 545. Again, this problem is not unique to televised trials. The community may also form a negative opinion before the trial of a case which is not televised.

Like mistrust of the unsequestered juror, this fear of influence is based on rejection of the assumptions which underlie the jury system. A potential juror who has formed an unshakeable opinion based on pretrial community opinion should be screened out in vior dire. Every member of the jury has promised to reach a verdict based exclusively on the evidence presented at trial.

Some critics of televised trials have speculated that jurors will be biased by their expectation of post-trial community reaction and that expectation alone may bias the jury regardless of whether the reaction ever occurs. When less than gavel to gavel coverage is provided the community will have a different basis for

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/[4]Precautionary measures are available for those who retain doubts about the jury. One Wisconsin court prevented cameras from filming anything which occurred outside the jurors' presence. *Wisconsin State Journal,* Section 3, p. 1, September 5, 1978 (Madison, Wisconsin). The media representatives covering a Washington trial imposed the same limitation on themselves. Solorzano, above, at 2050 n. 317. Thus even a juror who did watch a news report could not see evidence which was excluded from the trial.

forming an opinion than the jury does, but partial television coverage is no different in that regard than normal newspaper coverage which is necessarily incomplete. The jury will not feel pressure in a situation where there is partial coverage because if anyone were to disagree with the verdict the jurors could point out that the television audience was not exposed to all the evidence and did not hear the court's instructions. During one trial televised in Florida, the court requested the television announcer to caution the public periodically to remember they were not seeing the entire trial. Baker Report, above, at 16. If a trial is covered gavel to gavel, a jury would have no reason to anticipate that the public, having heard all the evidence and the court's instructions, would reach a different conclusion than the jury. So in neither situation would a jury have any reason to worry about whether the general public would agree with its verdict.

Jurors are likely to lose anonymity through means other than being televised, and televising a trial does not necessarily increase juror visibility. In a Wisconsin case recently televised gavel to gavel, the jurors' names, addresses, and occupations were prominently printed in the newspaper at the beginning and the end of the trial, *Capital Times,* Sec. 1, p. 1, June 19, 1980 (Madison, Wisconsin); *Wisconsin State Journal,* Sec. 1, p. 3, June 29, 1980 (Madison, Wisconsin), but the jurors did not appear on television because a Wisconsin Supreme Court rule prohibits photographing jurors./[5] In states where the trial court sets the conditions under which a trial may be televised, the court may order that jurors not be photographed. A Florida judge would have the authority to make such an order under Canon 3A(7) which permits electronic media and still

/[5]Wisconsin Rules, above, at xxii; AB 17.

photography coverage subject to the presiding judge's authority to prevent distractions and to ensure the fair administration of justice in the case. Florida Code of Judicial Conduct, Canon 3A(7).

During a fifteen month experiment when television and still photography were permitted in Wisconsin's trial courts, *see* Wisconsin Rules, above, at xix; AB 11, jurors in several cases were questioned about their experiences and their reactions to the cameras. In the first case only one juror commented that his wife received a number of calls from people who saw him on television, but they were not crank calls. Wisconsin Report at 26./[6] Four members of another jury were interviewed and all reported that they received no calls or letters during or after the trial from people who saw them on television. *Id.* at 30. None of the members of a third jury reported receiving calls or letters about the case from other people in the community. *Id.* at Appendix I. Thus practical experience refutes the claim that jurors who serve in a televised trial will be harassed. These jurors were not bothered even though the rules in effect did not prohibit photographing them. Under a rule or order which does impose that prohibition, community contact would be even less likely.

D. Distraction Due To Awareness That The Trial Is Being Televised.

The most elusive concern expressed in *Estes* was that jurors would be distracted simply because the

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/[6]The rules in effect during the experimental period did not prohibit photographing the jury. *See* Wisconsin Report, above, at 2-4. At the end of the experimental period the study committee recommended changing the rules to prohibit photographing jurors. Wisconsin Report, above, at 70. This change was made. AB 17.

televising was occurring even if the equipment were not obtrusive. 381 U.S. at 546. The experience of jurors who have sat on televised cases since *Estes* does not bear out the distraction hypothesis.

It is not unusual for other participants in televised trials to report a belief that jurors were distracted by the televising process. In a study of Florida's year-long experiment with cameras in the courtroom conducted by four Florida academicians, more than half the attorneys questioned stated that cameras were a serious source of distracton to jurors. Strawn Report, above, at 60. But the number of jurors who reported being distracted was smaller — just over a third of the group interviewed. *Id.* at 36. Interviewees were simply asked to agree or disagree with a statement that the television cameras were a distraction. Pryor, *et al.*, "The Florida Experiment: An analysis of on-the-scene responses to cameras in the courtroom," 45 So. Speech Comm. J. 12, 17 (1979). Those conducting the study noted that the results did not indicate whether the distraction level was substantial enough to affect the trial outcome. *Id.* at 21. The authors of the report also warned that their study was too small to permit inferences to be drawn from the data. Strawn Report, above, at 36. They commented that the problem of distraction did not appear to be as serious as some critics supposed and recommended that the study of participants in televised trials continue. *Id.* at 52. In a separate study, ninety to ninety-five percent of the Florida judges reporting to the supreme court stated that the presence of electronic media did not affect jurors in performing their duty. *Petition of Post-Newsweek,* above, at 770.

More open-ended interviews with jurors who sat in televised trials in Wisconsin indicate that they were not distracted by the knowledge that the trial was being photographed. Awareness of the process does not

equate with distraction. Jurors from three trials were interviewed, but only one juror said that the equipment bothered her at first and she eventually became unaware of it. Wisconsin Report, above, Appendix I. Her initial awareness had no effect on the jury's deliberation. *Id.* While many jurors said they were aware that the televising process was going on they were not distracted by it and all reported that it had no effect on their deliberations. *Id.* at 26, 29, 30 and Appendix I. The typical comment was that the juror was too absorbed in the trial or too intent on hearing every word of testimony to think aobut the trial being televised. *Id.* at 26 and Appendix I.

Jurors who have participated in televised trials in other jurisdictions have reacted similarly. After a Nevada trial which was videotaped for later broadcast, the jury foreman observed that filming the trial did not detract from the fact-finding process. Solorzano, above, at 2040. There were no complaints from jurors during Colorado's first six years of televising trials. Hall, "Colorado's Six Years' Experience Without Judicial Canon 35," 48 ABAJ 1120, 1121 (1962). All of the jury members in a Louisiana trial which was partially televised reported neutral feelings about the televising process. They did not attach more importance to the case than they otherwise would have because it was covered by television. Humphries, Report on Pilot Project on the Presence of Cameras and Electronic Equipment in the Courtroom 2, 3.*

Some critics argue that, because jurors may not recognize the impact the cameras' presence has on them, studies which ask for jurors' reactions are meaningless. *See, e.g.,* Wisconsin Report, above, at Appendix G. But it is unreasonable to say that the speculation of others as to a juror's reaction is more credible and accurate than the juror's own honest description of his feelings and thought processes.

Judges and attorneys must bear in mind that jurors do not share their familiarity with trial procedures. When television cameras are first permitted in courtrooms, judges and attorneys may be aware of them as a novelty. But for most jurors, in court for the first time and charged with an enormous responsibility, the presence of television may be the most familiar and least interesting part of the trial. This is confirmed by a report of a Washington trial taped by television cameras. When the judge asked whether the jurors had been distracted by cameras, many indicated they did not realize it was unusual to have cameras in court. Washington Report, above, at 33.

Many of the concerns about television's impact on jurors expressed in *Estes* were not based on television's unique characteristics. In the unusual case where prejudicial pretrial publicity has occurred or where a juror disregards the instruction not to read or watch news reports there are remedies and sanctions available short of banning television from courtrooms. The special distracting quality of the televising process which was feared has not proved to be a reality. The experience to date suggests that careful experimentation should continue, not be forbidden.

V. Any Unique Difficulties Which Witnesses In Televised Trials Might Experience Can Be Resolved By Incorporating Safeguards Into The Rules Governing Televised Proceedings.

In *Estes* the Court also expressed concern about the effect televising a trial might have on witnesses. 381 U.S. at 547. A variety of psychological reactions was envisaged, including fear, cockiness, and loss of

memory. *Id.* Witnesses might be harassed by strangers on the street, *id.*, and, like jurors, witnesses might not follow the court's instruction not to watch other witnesses and might then adjust their testimony so as to contradict or support that of other witnesses. *Id.*

Florida and other states which have authorized television coverage of trials have recognized that individual witnesses, as well as certain categories of witnesses, may have valid reasons for not having their testimony filmed. As a result not all witnesses will be required to testify before the camera.

In his concurring opinion in *Estes*, former Chief Justice Warren stated that requiring a witness to request that he or she not be photographed placed too great a burden on the witness, 381 U.S. at 568, although the basis for his conclusion was unclear since the trial judge in *Estes* had neglected to tell witnesses that they had that option. *Id.* While it would not seem to be an undue burden for most witnesses to request not to be filmed once they were advised that such a request was proper and regular, some states permit the court to order that a witness not be filmed even absent a request. In Florida, it is within the judge's discretion to exclude coverage of a witness:

> [U]pon a finding that such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from coverage by other types of media.

Petition of Post-Newsweek Stations, above, at 779. Among the categories of witnesses who might properly be excluded in the court's discretion are participants in child custody proceedings, prisoners, confidential

informants and witnesses under protection of anonymity, victims of sexual battery, and relatives of victims. *Id.*

Wisconsin's more explicit rule permits a judge to prohibit recording or filming a witness for cause upon request or on the judge's own motion. Wisconsin Rules, above, Rule 11a, at xxii; AB 16. A request is attended by the presumption of validity in, among others, "cases involving the victims of crimes, including sex crimes, police informants, undercover agents, relocated witnesses and juveniles, and in evidentiary suppression hearings, divorce proceedings and cases involving trade secrets." *Id.*

These rules provide adequate protection for witnesses who, due to the nature of their involvement in the case or to their personalities, would have unusual problems if they had to testify on camera. Experience has shown that not all witnesses have such difficulties, so a total ban on filming trials is not necessary to ensure that a defendant's right to a fair trial is not jeopardized by frightened, forgetful witnesses.

Testifying before a television camera cannot fairly be contrasted with testifying when only judge, jury, counsel, and the defendant are present. Ordinarily a witness cannot escape testifying because he becomes nervous when confronted with a crowded courtroom. Some anxiety is a normal by-product of being questioned under oath when one knows the consequences of the testimony are serious. The anxiety may be increased by the presence of a crowd, but we accept that as a fair cost of the public's right to attend a trial. Thus, in order to be excused from testifying before the television camera, a witness must have a claim based on something more substantial than the nervousness with which every witness must cope.

There are indications that televising trials may have a positive effect on some witnesses. In a scientific study simulating courtroom conditions, participants viewed a film on an unfamiliar subject. They were then asked to answer questions about the film's content. Some subjects were questioned while a television camera was in full view, others knew a camera was operating but could not see it, and a third group was questioned without a camera present. All believed either that the film would be viewed by many people or, in the case of those in the third group, that their answers would be widely circulated. Hoyt, "Courtroom Coverage: The Effects of Being Televised," 21 Journal of Broadcasting, 487, 490-92 (1977). Those subjects who confronted the obtrusive camera included more correct information in their answers and gave more extensive answers to the questions than did those in the other two groups. *Id.* at 493. The researcher concluded that the study did not bear out the assumption that people's memories would fail due to fear or anxiety when they faced a television camera. *Id.* at 494. While the study conditions do not precisely duplicate those of a trial, the results support the conclusion that the majority of witnesses are not devastated when they face a camera.

The study results were corroborated in an experimental videotaped Nevada trial where the witnesses reported neither embarrassment nor intimidation. Solorzano, above, at 2040. Trial participants were intially aware of the camera, but responded positively. *Id.* The presence of the camera heightened the quality of contributions to the trial. *Id.* at 2041. Nor did the Florida judge who presided at the *Zamora* trial during Florida's experimental period observe any of the problems with witnesses anticipated in *Estes*. Baker Report, above, at 15.

While it might be difficult for an observer to detect whether a witness is frightened or intimidated, the observer can identify a cocky witness who is showing off for the cameras. Yet judges presiding at televised trials have not observed that phenomenon. Judges in Nevada, Colorado, and Texas have commented that witnesses did not "strut," "showboat," or "grandstand." Solorzano, above, at 2040; Comment, "T.V. or not T.V.: Televised and Photographic Coverage of Trials," 29 Mercer L. Rev. 1119, 1132 (1978); Note, "Constitutional Aspects of Television in the Courtroom," 35 U. Cincinnati L. Rev. 48, 66 (1966).

Witnesses who were interviewed following their participation in televised Wisconsin trials during the experimental period reported nothing more serious than a slight distraction due to the television cameras. One police detective who was accustomed to testifying commented that after he took the stand he did not realize the cameras were present. Wisconsin Report, above, at 21. He noted that he is always nervous about testifying, but the cameras did not make him more nervous or distract him. *Id.* The detective did feel more responsible for his testimony due to the trial being televised. *Id.* Two other witnesses from the same trial agreed that neither the television cameras nor the fact that the trial was televised distracted them, *id.* at 22-23, although one was bothered by the clicking of a still camera. *Id.* at 22. In another trial, the judge asked witnesses to be alert for any distractions caused by the cameras, but he received no complaints. *Id.* at 24.

In a third Wisconsin trial, four witnesses reported being somewhat distracted or mildly bothered. *Id.* at Appendix I. One of the four was motivated by his slight consciousness of the camera to avoid using slang expressions. *Id.* Four other witnesses who testified in the same trial did not notice the cameras or feel uncomfortable about their presence. *Id.* The

problems feared by the *Estes* court did not arise in the Wisconsin trials studied during the one year experiment.

The problem of witnesses failing to abide by a sequestration order is, again, not unique to televised trials although it would be easier for a witness to watch another witness on television than to approach the witness directly or to ask a third person about the testimony. But the witness who abuses the system by violating a court order is the exception. The decision whether trials may be televised should not be based on the premise that people normally disregard court orders. A witness who does disregard an order will be subject to the same sanctions as a witness who violates a sequestration order in a non-televised trial. The mechanics of notifying all witnesses of the order at the start of the trial should not present an overwhelming problem./[7]

Experience with televised trials shows that most witnesses are no more nervous about testifying in front of cameras than they would be about testifying at all. Rules which prohibit photographing those witnesses who have a substantial reason for not wanting their testimony televised have been and can be sanctioned. Such justified exceptions will protect a defendant's right to a fair trial.

/[7]In one Wisconsin trial the court notified counsel that *voir dire* of any witness could be had outside the presence of the jury to determine whether the witness had watched others testifying on television. No requests for *voir dire* were made. Wisconsin Report, above, at 37.

In his report on the trial, the court recommended that all lay witnesses subpoenaed in a trial receive, upon request of counsel, a written order prohibiting their watching or listening to other witnesses. He suggested that witnesses who violated the order could be prevented from testifying. *Id.*

VI. A Televised Trial Does Not Place An Administrative Burden On The Judge Which Diverts The Judge's Attention From Other Duties.

The *Estes* court was concerned that the task of managing the media would divert the judge's attention and energy from the primary responsibility of ensuring that the defendant receives a fair trial. 381 U.S. at 548. Although media presence does require some special planning and coordination, the entire burden does not have to fall on the trial judge. As televised trials become more common in a jurisdiction many of the procedures will become routine so that increasingly less attention to the media is necessary.

In many states, when the state supreme court permits televising trials on an experimental or permanent basis, the court also promulgates rules or guidelines which resolve questions that would otherwise fall to the trial judge to determine. *See,* Boyd, above, at 828. The Supreme Courts of both Florida and Wisconsin promulgated detailed standards covering equipment and personnel and their location, sound and light criteria, and coverage of courtroom conferences. *Petition of Post-Newsweek,* above, at 792-94; AB 1-6; Wisconsin Rules, above, at xx-xxii; AB 11-17./[8] The Florida court even specified by brand name and model the equipment which may be used. *Petition of Post-Newsweek,* above, at 794; AB 5-6. In Wisconsin, a media coordinator is designated for each judicial

/[8]Similar guidelines for televising court proceedings have been promulgated by the state supreme court in Tennessee, Notes following Canon 3(A)7, Code of Judicial Conduct (1979); *Oklahoma, Canon 3(A)(7)(f),* Code of Judicial Conduct; *Iowa, In the Matter of Media Coverage of the Courts,* Order entered November 21, 1979; and *Montana, In The Matter of Canon 35 of the Montana Canons of Judicial Ethics,* Order entered April 18, 1980, *see* AB 6-10.

administrative district./[9] The coordinator's duties are to work with the chief judge of the district and with the trial judge to implement the rules. Wisconsin Rules, above, Rule 2, at xx; AB 13. Disputes concerning the application of the rules are to be resolved as an administrative matter by the district's chief judge. Wisconsin Rules, Rule 10, above, at xxii; AB 16. In Georgia and Alabama, the supreme court must authorize the media plan for each courtroom before any proceedings are televised. Canon 3 (A8), Georgia Code of Judicial Conduct; Canon 3 (7A) (a), Alabama Canons of Judicial Ethics.

It is feasible to structure the general regulations covering courtroom filming in a way which eliminates many decisions on minor technical matters that the court would otherwise have to make in each case. The decisions which remain, such as whether to prohibit photographing particular witnesses for cause, are comparable to decisions on suppressing evidence which judges routinely handle and which are not unduly burdensome.

Judges who have presided at televised trials have not found that the additional responsibility interfered with their ability to control the trial and ensure its fairness. The judge who presided at the highly publicized *Zamora* trial in Florida made a detailed

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/[9]Media coordinators are also appointed in Iowa. *In the Matter of Media Coverage of the Courts, Rule 3(a),* (Order entered November 21, 1979). The Florida judge who presided at the *Zamora* trial, which received international press coverage, appointed a television station news manager to act as liaison between the court and the press. The court took this action on its own authority because there was an unusually large number of media representatives. Baker Report, above, at 3-4. The court was satisfied with the results. *Id.* The same procedure was successfully utilized in another Florida trial. Sholts Report, above, at 6.

report on the trial to the Florida Supreme Court. His report describes a trial which ran very smoothly and he makes no reference to feeling burdened by media management duties. Baker Report, above, at 8-18. The judge in another televised Florida trial remained opposed to televising criminal trials after the experiment but his opposition was based largely on anticipation of problems which might occur in other trials. Sholts Report, above, at 17. The judge acknowledged that televising the trial worked out much better than he believed possible, *id.* at 10, and he did not report being burdened by media related problems. A third Florida judge, who had presided at one televised trial and observed another, stated that he was in basic agreement with the anti-television sentiments expressed in the Sholts Report. Mounts, Report to the Supreme Court of Florida concerning audio visual trial coverage 1.* Yet he reported that the media representatives were cooperative and their behavior commendable. *Id.* Judge Mounts reported no management problems.

Two of the Wisconsin judges who presided at televised trials during the experimental period noted that the presence of the media increased their supervisory responsibilities and was somewhat burdensome, but not to an extent which interfered with performing their principal duties. Wisconsin Reprot, above, at 30 and Appendix I. But another judge who presided at a murder trial found the administrative responsibility no different than in any trial. *Id.* at 38. A fourth judge successfully delegated most of his supervisory duties to the bailiff. *Id.* at 11. The judge conferred with the media coordinator, but had only one media related problem to resolve in the course of a three day trial.

Many of the burdens on trial judges which the *Estes* court feared would result from televising trials

can be and have been avoided through the promulgation of detailed statewide guidelines governing the media. The experience of judges to date is that resolving the individual problems which arise does not interfere with their other responsibilities.

VII. The Presence Of Cameras Has Not Provoked Inappropriate Conduct On The Part Of Judges And Attorneys.

The *Estes* court speculated that judges and attorneys might yield to the same temptation as some witnesses and play to the television audience. 381 U.S. at 548, 579. Elected judges and prosecutors might seek to create an impression which would ensure reelection, 381 U.S. at 548-49, while defense attorneys would direct their energy toward impressing prospective clients in the audience rather than representing the defendant to the best of their ability. *Id.* at 579. Experience in televised trials around the country has shown these concerns to be unfounded.

In a study of Florida attorneys, a majority of those who had participated in televised trials said their colleagues did not play to the television audience. Buchanan, *et al.*, "The Florida Experiment," 15 Trial 34, 35-36 (April 1979). Further, the attorneys believed that a strong judge could control the situation to prevent attorneys from behaving inappropiately. *Id.* Most of the trial judges questioned by the same researchers agreed that attorneys had not played to the cameras. Strawn Report, above, at 51. Another survey of Florida trial judges produced the same result. Whisenand, "Florida's Experience with Cameras in the Courtroom," 64 ABAJ 1860, 1864 (1978). One judge who prepared a detailed report on a televised trial commented that there were "no histrionics and no thespians." The attorneys were properly behaved. Sholts Report, above, at 10.

Some trial attorneys are unquestionably more flamboyant than others and the attorneys and judges who did report that attorneys played to the cameras may have encountered the flamboyant ones. But the surveys have not determined that these attorneys act differently before a television camera than they do before a live courtroom audience. If there is no difference, and the fact that most attorneys are not perceived to play to the wider television audience suggests there is not, the dramatic behavior cannot be attributed to television cameras. As the Colorado Supreme Court justice who recommended opening Colorado's courts to the cameras twenty-five years ago observed, "a lawyer who so demeans himself before a camera does not change his inherent characteristics for that particular occasion." *In Re Hearings Concerning Canon 35,* 296 P.2d 465 (Colo. 1956).

Reports from other states confirm the experience of Florida and Colorado. A Louisiana judge who presided at two televised trials stated that the attorneys did not "ham it up" because cameras were present. Humphries Report, above, at 4. His opinion was shared by judges reporting on televised trials in Washington and Texas. Solorzano, above, at 2048 n. 311; Note, "Constitutional Aspects of Television in the Courtroom," 35 U. Cincinnati L.Rev. 48, 66 (1966). One Wisconsin judge thought some attorneys might be theatrical, but said none were in his court. Wisconsin Report, above, at 25. Another commented that the attorneys appearing in a televised trial before him had better posture than usual, but the cameras had no other effect on them. *Id.* at 12.

Some observers believe that the presence of cameras has a notable positive effect on attorneys' conduct. One Wisconsin defense attorney remarked that the presence of cameras would deter incompetent attorneys whose performance could not stand up under

scrutiny. *Id.* at 16. In a videotaped Nevada trial, the participants all reacted positively to the camera in a way which was consistent with the defendant's right to a fair trial. Solorzano, above, at 2040.

The weight of the evidence shows that most attorneys do not react inappropriately to television cameras. If an attorney did react to the presence of television cameras in a way which jeopardized his client's interests, the client would have a remedy through appeal or other post-conviction relief. The attorney could also be subject to disciplinary proceedings. *See* Baker Report, above, at 17. Since remedies and sanctions are available to protect defendants against those attorneys who might react inappropriately, there is no reason to bar television cameras from courtrooms on the basis of attorneys' misbehavior.

There is less information available concerning judges' performances in televised trials than concerning attorneys' performances, but what is available indicates that judges, like attorneys, have not played to the television audience. The judges themselves report that the presence of cameras made no difference to them. Their behavior changed only in inconsequential ways: one said that he sat straighter and another that he chose his tie more carefully on days the cameras were in court. Wisconsin Report, above, at 12 and 24. Another judge observed that since trials are public and the judge's behavior is a matter of public record, there is nothing about a televised proceeding to make a judge act differently than usual. *Id.* at 39.

Attorneys who appeared in the trials over which these judges presided agreed with their self-assessments. Two defense attorneys who believed some judges might indulge in theatrical behavior conceded that the judges in their cases behaved well and

appeared unaffected. *Id.* at 14 and 31. Jurors and an official observer at another televised trial agreed that the judge was unaffected by the presence of the cameras. *Id.* at 29 and 30. One defense attorney even remarked that the presence of the cameras caused a judge to be more restrained than he had been on other occasions. *Id.* at Appendix I.

The Florida judge who received broad public exposure when he presided at the *Zamora* trial/[10] argues that televised trials give the public a valuable opportunity to observe elected officials. Baker Report, above, at 15. The *Estes* court feared that defendants' rights might be disregarded by posturing judges, but public scrutiny can lead instead to the removal of rude, indecisive, inattentive judges and of those who have not kept abreast of the law or are unable to control their emotions. *Id.* at 15-16.

Experience has revealed no general tendency on the part of attorneys and judges to put on a show simply because television cameras are present. The excesses of those whose normal style is to play to the courtroom audience cannot be blamed on television.

VIII. Trials Can Be Televised Without Harassing The Defendant.

The *Estes* court was concerned that a defendant might be harassed psychologically by the presence of television cameras and therefore be unable to concentrate on the proceedings. 381 U.S. at 549. A defendant might also be unable to confer confidentially with counsel due to the cameras' intrusiveness and thereby be denied the effective assistance of counsel. *Id.*

/[10]The judge estimated that the trial was viewed by several million people around the world. Baker Report, above, at 17.

There is less information available about defendants' reactions to televised trials than there is about the reactions of other participants. But while defendants have more at stake than other trial participants do, their reactions cannot be assumed to be totally different than those of the other participants. When jurors and witnesses report that they were not distracted by the presence of cameras or the fact that the trial was televised, and when jurors say they were too absorbed in the proceedings to think about the television cameras, it is fair to infer that the defendant would share those reactions.

That inference is supported by the fact that the arrangement of television equipment in most courtrooms makes it less apparent to the defendant than to jurors and witnesses. In Florida, the chief judge of each circuit designates where the equipment is to be placed in a courtroom. *Petition of Post-Newsweek,* above, at 793; AB 3. The equipment can be placed in such a position that only the back of the defendant's head is photographed. The Florida rules also prohibit still photographers from moving about to obtain photographs, *id.,* so defendants cannot be subjected to having photographers pop up on all sides of them.

Rules regarding placement of equipment which provide even greater protection thatn Florida's do can be devised. In Wisconsin, the rules governing media coverage not only authorize the trial judge to desigante where the equipment is placed, but require that the equipment be placed only in areas of the courtroom open to the public. Wisconsin Rules, Rule 5 (a), above, at xxi; AB 15. Under such a rule the cameras would have to be behind the rail and therefore behind the defendant.

Both Florida and Wisconsin rules prohibit audio pick-up or broadcast of attorney-client conferences.

Petition of Post-Newsweek, above, at 793-94; AB 4; Wisconsin Rules, above, at xxii; AB 15. The Wisconsin rules also prohibit operating audio or visual equipment during recesses. Wisconsin Rules, above, at xxii; AB 15. These regulations protect the defendant's right to confer confidentially with his attorney.

While abuses which would deny a defendant his right to a fair trial could occur in some cases, the defendant is not denied a fair trial simply because the trial is televised. In a Florida study of ninety-seven attorneys who had experience with televised trials, the respondents were almost evenly divided as to whether the presence of cameras unduly harassed the defendant. Buchanan, *et al.,* "The Florida Experiment," 15 Trial 34, 35 (1979). Thus, other participants in televised trials did not view the presence of cameras as inevitably unfair to the defendant. The only defendant interviewed during Wisconsin's experiment stated that he was not distracted by the media's presence and would not have preferred to testify without television cameras present. Wisconsin Report, above, at 20. In the widely covered *Zamora* trial, neither the defendant nor his attorney objected to or appeared to be concerned about the cameras' presence. Baker Report, above, at 16.

The defendant's interests in not being harassed and in being able to concentrate on the proceedings and confer effectively with his attorney are crucial aspects of a fair trial. There is not much data on defendant's reactions to televised trials available now, but what there is indicates that it is possible to regulate the media so that their presence does not weigh heavily on the defendant. Particular attention should be paid to this area of concern as study of televised trials continues.

CONCLUSION

Reports from Florida and other states demonstrate that televising a trial does not have the adverse effects on trial participants anticipated in *Estes*. Televised trials do not inevitably deny defendants their due process rights. Unless specific prejudice is shown, a televised trial must be regarded as a fair trial. This case should be resolved in a manner which permits the states to continue experimenting with electronic media coverage of court proceedings.

Respectfully submitted,

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APPENDIX

FLORIDA RULES GOVERNING TELEVISION, RADIO, AND PHOTOGRAPHIC COVERAGE OF JUDICIAL PROCEEDINGS

APPENDIX 3

STANDARDS OF CONDUCT AND TECHNOLOGY GOVERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF JUDICIAL PROCEEDINGS

1. Equipment and personnel.

(a) Not more than one portable television camera [film camera — 16 mm sound on film (self blimped) or video tape electronic camera], operated by not more than one camera person, shall be permitted in any trial court proceeding. Not more than two television cameras, operated by not more than one camera person each, shall be permitted in any appellate court proceeding.

(b) Not more than one still photographer, utilizing not more than two still cameras with not more than two lenses for each camera and related equipment for print purposes shall be permitted in any proceeding in a trial or appellate court.

(c) Not more than one audio system for radio broadcast purposes shall be permitted in any proceeding in a trial or appellate court. Audio pickup for all media purposes shall be accomplished from existing audio systems present in the court facility. If no technically suitable audio system exists in the court facility, microphones and related wiring essential for media purposes shall be unobtrusive and shall be located in places designated in advance of any proceeding by the chief judge of the judicial circuit or district in which the court facility is located.

(d) Any "pooling" arrangements among the media required by these limitations on equipment and personnel shall be the sole responsibility of the media without calling upon the presiding judge to mediate any dispute as to the appropriate media representative or equipment authorized to cover a particular proceeding. In the absence of advance media agreement on disputed equipment or personnel issues, the presiding judge shall exclude all contesting media personnel from a proceeding.

2. Sound and light criteria.

(a) Only television photographic and audio equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. Specifically, such photographic and audio equipment shall produce no greater sound or light than the equipment designated in Schedule A annexed hereto, when the same is in good working order. No artificial lighting device of any kind shall be employed in connection with the television camera.

(b) Only still camera equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. Specifically, such still camera equipment shall produce no greater sound or light than a 35 mm Leica "M" Series Rangefinder camera, and no artificial lighting device of any kind shall be employed in connection with a still camera.

(c) It shall be the affirmative duty of media personnel to demonstrate to the presiding judge adequately in advance of any proceeding that the equipment sought to be utilized meets the sound and light criteria enunciated herein. A failure to obtain advance judicial approval for equipment shall preclude its use in any proceeding.

3. Location of equipment personnel.

(a) Television camera equipment shall be positioned in such location in the court facility as shall be designated by the chief judge of the judicial circuit or district in which such facility is situated. The area designated shall provide reasonable access to coverage. If and when areas remote from the court facility which permit reasonable access to coverage are provided all television camera and audio equipment shall be positioned only in such area. Video tape recording equipment which is not a component part of a television camera shall be located in an area remote from the court facility.

(b) A still camera photographer shall position himself or herself in such location in the court facility as shall be designated by the chief judge of the judicial circuit or district in which such facility is situated. The area designated shall provide reasonable access to coverage. Still camera photographers shall assume a fixed position within the designated area and, once a photographer has established himself or herself in a shooting position, he or she shall act so as not to call attention to himself or herself through further movement. Still camera photographers shall not be permitted to move about in order to obtain photographs of court proceedings.

(c) Broadcast media representatives shall not move about the court facility while proceedings are in session, and microphones or taping equipment once positioned as required by 1. (c) above shall not be moved during the pendency of the proceeding.

4. Movement during proceedings.

News media photographic or audio equipment shall not be placed in or removed from the court facility except prior to commencement or after adjourn-

ment of proceedings each day, or during a recess. Neither television film magazines nor still camera film or lenses shall be changed within a court facility except during a recess in the proceeding.

5. Courtroom light sources.

With the concurrence of the chief judge of a judicial circuit or district in which a court facility is situated, modifications and additions may be made in light sources existing in the facility, provided such modifications or additions are installed and maintained without public expense.

6. Conferences of counsel.

To protect the attorney-client privilege and the effective right to counsel, there shall be no audio pickup or broadcast of conferences which occur in a court facility between attorneys and their clients, between co-counsel of a client, or between counsel and the presiding judge held at the bench.

7. Impermissible use of media material.

None of the film, video tape, still photographs or audio reproductions developed during or by virtue of coverage of a judicial proceeding shall be admissible as evidence in the proceeding out of which it arose, any proceeding subsequent or collateral thereto, or upon any retrial or appeal of such procedings.

8. Appellate review.

Review of an order excluding the electronic media from access to any proceeding, excluding coverage of a particular participant or upon any other matters arising under these standards shall be pursuant to Florida Rule of Appellate Procedure 9.100 (d).

SCHEDULE A

FILM CAMERAS — 16mm Sound on Film (self blimped)

1. CINEMA PRODUCTS	CP-16A-R	Sound Camera
2. ARRIFLEX	16mm-16BL Model	Sound Camera
3. FREZZOLINI	16mm (LW16)	Sound on Film Camera
4. AURICON	"Cini-Voice"	Sound Camera
5. AURICON	"Pro-600"	Sound Camera
4. GENERAL CAMERA	SS III	Sound Camera
7. ECLAIR	Model ACL	Sound Camera
8. GENERAL CAMERA	DGX	Sound Camera
9. WILCAM REFLEX	16mm	Sound Camera

VIDEO TAPE ELECTRONIC CAMERAS

1. Ikegami	HL-77 HL-33 HL-35 HL-34 HL-51
2. RCA	TK76
3. Sony	DXC—1600 Trinicon
3a. ASACA	ACC-2006
4. Hitachi	SK 80 SK 90
5. Hitachi	FP-3030
6. Philips	LDK 25
7. Sony BVP 200	ENG Camera
8. Fernseh	Video Camera
9. JVC 8800 u	ENG Camera
10. AKAI	CVC-150 VTS-150
11. Panasonic	WV-3085 NV-3085
12. JVC	GC 4800u

VIDEO TAPE RECORDERS/used with video cameras

1.	Ikegami	3800
2.	Sony	3800
3.	Sony	BVU-100
4.	Ampex	Video Recorder
5.	Panasonic	1 inch Video Recorder
6.	JVC	4400
7.	Sony	3800H

See, In Re Petition of Post-Newsweek Stations, Florida Inc., 370 So. 2d 764, 792-795 (Fla. 1979).

MONTANA RULES GOVERNING RADIO AND TELEVISION BROADCASTING AND STILL PHOTOGRAPHY IN COURT

IN THE SUPREME COURT OF THE STATE OF MONTANA

IN THE MATTER OF CANON 35 OF THE MONTANA CANONS OF JUDICIAL ETHICS

ORDER

PER CURIAM:

By order dated February 3, 1978, this Court suspended the operation of Canon 35 of the Montana Canons of Judicial Ethics and superseded former Canon 35 by a revised Canon 35 effective April 1, 1978, for an experimental period of two years from and after April 1, 1978, or until sooner terminated or modified by order of this Court.

Since entry of that order recording and broadcasting by radio and television and taking of photographs in the courtroom have been permitted subject to the control of the presiding judge in any

proceeding. An informal questionnaire was sent to all District Judges concerning their experience with the operation of revised Canon 35 at the conclusion of one year of the experimental period of its operation. At the conclusion of the two year experimental period this Court reactiviated the Canon 35 Committee which held another meeting and canvassed the electronic and print media as well as the District Judges of this State concerning whether revised Canon 35 should be made permanent. Thereafter this Court canvassed the District Judges of this State to the same end. The Court has received the recommendation of the Canon 35 Committee that the revised Canon should be made permanent.

IT IS NOW ORDERED:

(1) Revised Canon 35 shall permanently supersede former Canon 35 permanently following the two year experimental period of its operation.

(2) A copy of revised Canon 35 is attached to this order.

(3) A copy of Revised Canon 35 shall be printed in the Montana Laywer and shall be contained in a future Volume of the Montana Reports.

(4) Revised Canon 35 shall take effect immediately.

DATED this 18th day of April, 1980.

CANON 35

The presiding judge in any court proceedings open to the public shall permit the recording and broadcasting by radio and television and the taking of photographs in the courtroom unless he is convinced from the particular circumstances of the individual case, or any portion thereof, that such recording,

broadcasting, or photography would substantially and materially interfere with the primary function of the court to resolve disputes fairly under the law.

In any case, or portion thereof, in which the presiding judge prohibits such recording, broadcasting, or photography, he must state his reasons for such prohibition in the record of such case.

No provision herein shall grant the media any greater access or rights than permitted by statute in those proceedings wherein public or media access or publication is prohibited, restricted or limited by law.

The provisions hereof shall apply to the Supreme Court of Montana and all other courts of the State of Montana over which the Supreme Court has supervisory control.

The following illustrative guidelines are presented as an aid to the judiciary and the media in implementing the provisions of this Canon:

ILLUSTRATIVE BROADCAST GUIDELINES

1. **Judge.** The judge has the authority to direct whether equipment may be taken within the courtroom. The broadcast news person should advise the judge prior to the start of a court session that he or she desires to electronically record and/or broadcast live from within the courtroom. The judge may issue instructions as to where the broadcast reporter and/or camera operator may position themselves. In the absence of any directions from the judge, the position should be behind the front row of spectator seats by the least used aisleway or other unobtrusive but viable location.

2. **Pooling.** The number of cameras in the courtroom shall be at the descretion [sic] of the presiding judge. Where coverage is by both radio and TV, the

microphone used by TV should also serve for radio, and radio should be permitted to feed from the TV sound system. Multiple radio feeds, if any, should be provided by a junction box. It should be the responsibility of each broadcast news representative present at the opening of each session of court to achieve an understanding with all other broadcast representatives as to who will function at any given time, or, in the alternative, how they will pool their photographic coverage. This understanding should be reached outside the courtroom and without imposing on the judge or court personnel.

3. **Broadcast Equipment.** All running wires used should be securely taped to the floor. All broadcast equipment should be handled as inconspicuously and quietly as reasonably possible. Sufficient film and/or tape capacities should be provided to obviate film and/or tape changes except during court recess. No additional lights should be used without the specific approval of the presiding judge and then only as he may specifically approve as may be needed in the case of appellate hearings.

4. **Decorum.** Broadcast representatives' dress should not set them apart unduly from other trial spectators. Camera operators should not move tripod cameras except during court recesses. All broadcast equipment should be in place and ready to function no less than 15 minutes before the beginning of each session of court.

ILLUSTRATIVE PRINT MEDIA GUIDELINES

1. **Judge.** The judge has authority to decide whether photographs may be taken within the courtroom. The photographer should advise the judge, prior to the start of a court session, that he or she desires to take photographs. The judge may issue instructions as

to where the photographer may position himself or herself. In the absence of any directions from the judge, the photographer should remain behind the front row of spectator seats.

2. **Pooling.** Unless the judge allows otherwise, no more than one still picture photographer is to be taking pictures in the courtroom at any one time. It is the responsibility of each photographer present at the opening of each session of court to achieve an understanding with all other photographers present as to which will function at any given time, or, in the alternative, how they will pool their photographic coverage. This understanding must be reached outside the courtroom and without imposing on the judge or court personnel.

3. **Equipment.** The photographer's dress and equipment should not set him or her apart unduly from other trial spectators. Cameras which operate without flash and with a minimum of noise should be utilized.

4. **Decorum.** The photographer's movement in and out of the courtroom and while taking pictures should not be obtrusive. He or she should not, for example, assume body positions inappropriate for spectators.

These illustrative guidelines are subject to modification by a majority of the judges of any court to meet local conditions in their area and within their jurisdiction. Any such modification shall be in writing and disseminated to the affected media by appropriate means. *See 5 Montana Lawyer* (May 1980) at 12-13.

WISCONSIN RULES GOVERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF JUDICIAL PROCEEDINGS

ORDER

The court on December 23, 1977, having ordered a suspension of Rule 14 of the Code of Judicial Ethics for a one-year period beginning April 1, 1978, and having adopted standards of conduct to govern the use of audio or visual equipment in Wisconsin courtrooms for that period, and having appointed a committee to monitor and evaluate the use of audio and visual equipment in the courtroom and to file a report with the court of its findings and recommendations, and the experimental period having been extended by order of the court through June 30, 1979, and the committee having filed its report of findings and recommendations on March 30, 1979, and a public hearing having been held on June 12, 1979, on the report and recommendations, and appearances before the court and before the committee having been made by media representatives, trial attorneys, prosecutors, the office of the State Public Defender and members of the public,

On the basis of the experience during the fifteen-month experimental period and upon the recommendations of the committee,

IT IS ORDERED that Rule 14 of the Code of Judicial Ethics is hereby rescinded.

IT IS FURTHER ORDERED that the rules attached hereto are hereby adopted to govern electronic media and still photography coverage of judicial proceedings in Wisconsin effective July 1, 1979.

IT IS FURTHER ORDERED that the committee appointed by the court and consisting of the following members:

Professor David Fellman, Chairman
Attorney William Adler
Richard Bauer
Honorable William J. Duffy
Honorable William F. Eich
Edward Hinshaw
Professor James Hoyt
Nancy Mersereau
Attorney James Peter O'Neill
Anne Rossmeier
Honorable Michael T. Sullivan

is discharged with the graditude of the court for the intensive, thorough study of the matter which it conducted during the experimental period and for the excellent report which it filed for the court's information and consideration.

IT IS FURTHER ORDERED that a copy of this order shall be published in the official state newspaper and in the Wisconsin Bar Bulletin.

Dated at Madison, Wisconsin, this 21st day of June, 1979.

BY THE COURT:
/s/ Marilyn L. Graves
Marilyn L. Graves
Clerk of Supreme Court

RULES GOVERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF JUDICIAL PROCEEDINGS

1. *Authority of Trial Judge*

(a) These rules of conduct do not limit or restrict the power, authority, or responsibility otherwise vested in the trial judge to control the conduct of proceedings before the judge. The authority of the trial judge over the inclusion or exclusion of the press or the public at particular proceedings or during the testimony of particular witnesses is applicable to any person engaging in any activity authorized by these rules.

(b) The term "trial judge" includes any judicial officer who conducts a public proceeding.

2. *Media Coordinator*

(a) The Wisconsin Freedom of Information Council shall designate for each administrative district a coordinator who shall work with the chief judge of the administrative district and the trial judge in a court proceeding in implementing these rules. Geographically large administrative districts shall be subdivided by agreement between the Council and the chief judge, with a coordinator designated for each subdistrict.

(b) Where possible, the trial judge shall be given at least three days' notice of the intention of the media to bring cameras or recording equipment into the courtroom. In the discretion of the trial judge, this notice rule may be waived where cause for such waiver is demonstrated.

3. *Equipment and Personnel*

(a) Except as otherwise provided in (b), three television cameras, each operated by one person, and three still photographers, each not using more than two cameras, are authorized in any court proceeding. Priority consideration will be extended to one of the three cameras to televise an entire proceeding from beginning to end.

(b) The trial judge may authorize additional cameras or persons at the request of the media coordinator or may limit the number of cameras where circumstances permit such increase or require such limitation.

(c) One audio system for radio broadcast purposes is authorized in any court proceeding. Audio pickup for all media purposes must be made through any existing audio system in the court facility, when practical. If no suitable audio system exists in the court facility, microphones and related wiring must be as unobtrusive as possible.

(d) The media coordinator shall be responsible for receiving requests to engage in the activities authorized by these rules in a particular court proceeding and shall make the necessary allocations of authorizations among those filing the requests. In the absence of advance media agreement on disputed equipment or personnel issues, the trial judge shall exclude all audio or visual equipment from the proceeding.

4. *Sound and Light Criteria*

Only audio or visual equipment which does not produce distracting light or sound may be used to cover a court proceeding. Artificial lighting devices must not be used in connection with any

audio or visual equipment. Only equipment approved by the trial judge in advance of the court proceeding may be used during the proceeding.

5. *Location of Equipment and Personnel*

(a) The trial judge shall designate the location in the courtroom for the camera equipment and operators. The trial judge shall restrict camera equipment and operators to areas open to the public, but the camera equipment and operators must not block the view of persons seated in the public area of the courtroom.

(b) Camera operators shall occupy only the area authorized by the trial judge and shall not move about the courtroom for picture taking purposes during the court proceeding. Equipment authorized by these rules may not be moved during the proceeding.

6. *Courtroom Light Sources*

Modifications in the lighting of a court facility may be made only with the approval of the trial judge. Approval of other authorities may also be required.

7. *Conferences*

Audio pickup, broadcast, or recording of a conference in a court facility between an attorney and client, co-counsel, or attorneys and the trial judge held at the bench is not permitted.

8. *Recesses*

Audio or visual equipment authorized by these rules must not be operated during a recess in a court proceeding.

9. *Official Court Record*

Notwithstanding any film, videotape, photography or audio reproduction made in a court proceeding as a result of these rules, the official court record of the proceeding is the transcript of the original notes of the court reporter made in open court or pursuant to an order of the court.

10. *Resolution of Disputes*

A dispute as to the application of these rules in a court proceeding may be referred only to the chief judge of the administrative district for resolution as an administrative matter. An appellate court shall not exercise its appellate or supervisory jurisdiction to review at the request of any person or organization seeking to exercise a privilege conferred by these rules any order or ruling of a trial judge or chief judge under these rules.

11. *Prohibition of Photographing at Request of Participant*

(a) A trial judge may for cause prohibit the audio recording and the photographing of a participant with a film, videotape or still camera on the judge's own motion or on the request of a participant in a court proceeding. In cases involving the victims of crimes, including sex crimes, police informants, undercover agents, relocated witnesses and juveniles, and in evidentiary suppression hearings, divorce proceedings and cases involving trade secrets, a presumption of validity attends the requests; the trial judge shall exercise a broad discretion in deciding whether there is cause for prohibition. This list of requests which enjoy the presumption is not exclusive; the judge may in his or her discretion find cause in comparable situations.

(b) Individual jurors shall not be photographed, except in instances in which a juror or jurors consent. In courtrooms where photography is impossible without including the jury as part of the unavoidable background, such is permitted, but close-ups which clearly identify individual jurors are prohibited. Trial judges shall enforce this rule for the purpose of providing maximum protection for jury anonymity.

12. *Inapplicability to Individuals; Use of Material for Advertising Prohibited.*

The privileges granted by these rules to photograph, televise and record court proceedings may be exercised only by persons or organizations which are part of the news media. Film, videotape, photography and audio reproductions may not be used for unrelated advertising purposes.

See Rules Governing Electronic Media and Still Photography Coverage of Judicial Proceedings, In re Code of Judicial Ethics, 90 Wis. 2d xix (1979).